Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1978

No. 78-522

CHARLES WENTZ and V.I.P. ELECTRIC, Inc.,
PETITIONERS,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL NO. 1525,
RESPONDENTS.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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In The

United States District Court

for the District of Nebraska

CHARLES WENTZ and V.I.P. ELECTRIC, INC., a corporation, PLAINTIFFS,

vs.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL NO. 1525,
DEFENDANTS

MEMORANDUM ON MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT

CV76-L-60

In this case the plaintiffs, Charles Wentz and V.I.P. Electric, Inc., seek to recover damages from the defendant labor unions for injuries to Wentz allegedly caused by the unions' failure to negotiate and enforce reasonably safe working conditions. The two defendants are International Brotherhood of Electrical Workers (the International) and International Brotherhood of Electrical Workers, Local No. 1525 (the Local). In one paragraph of the amended complaint, filing 21, the plaintiffs allege that the unions' acts and omissions were arbitrary, discriminatory, or in bad faith; in another paragraph it is alleged that the unions' conduct was wilful. Both defendants have filed motions to dismiss the complaint on the ground that it fails to state a claim or in the alternative for summary judgment. In addition, the International has filed a motion to dismiss, which has

been treated as a motion for summary judgment, on the ground that it cannot be held liable for the acts of the Local. A hearing has been held and the motions have been submitted on depositions, affidavits and briefs.

In an earlier memorandum in which I granted a motion to dismiss for failure to state a claim under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, but in which I also allowed the plaintiffs to amend the complaint to allege a claim under § 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a), I stated:

> "Language in the complaint suggests, however, that this may also be viewed as a suit seeking damages for the union's breach of its duty of fair representation. *Bryant*, supra. The court in *Beriault v Local 40, Super Cargoes & Checkers of I.L. & W.U.*, 501 F.2d 258, 263 (C.A. 9th Cir. 1974), sets the legal background for the duty:
>
> > 'In Steele v Louisville & N. R.R., 323 U.S. 192, 65 S. Ct. 226, 89 L. Ed. 173 (1944), a case involving the Railway Labor Act, the Supreme Court first announced that a union has the statutory duty to represent fairly all of the members of the employee bargaining unit. Later, in Ford Motor Co. v Huffman, 345 U.S. 330, 73 S. Ct. 681, 97 L. Ed. 1048 (1953), the Court applied the doctrine to a case under the NLRA. This duty is implied from the grant to the union by § 9(a) of the NLRA, 29 U.S.C. § 159(a), of exclusive power to represent all employees in the unit. Vaca v Sipes, *supra*, 386 U.S. at 177, 87 S. Ct. 903. Section 1337, 28 U.S.C. § 1337, confers jurisdiction on federal courts over suits for breach of this duty. Retana v Apartment Workers, Local 14, 453 F.2d 1018, 1022 (9th Cir. 1972); Waters v Wisconsin Steel Works, 427 F.2d 476, 490 (7th Cir. 1970), cert. denied, United Order of Am. Bricklayers and Stone Masons Local 21 v Waters, 400 U.S. 911, 91 S. Ct. 137, 27 L. Ed. 2d 151 (1970).' "

As noted, the amended complaint does allege wilful, arbitrary, discriminatory and bad faith conduct on the part of the unions in failing to negotiate and enforce reasonably safe working conditions for the plaintiff Wentz. I stand by my previous

determination that such allegations do state a claim. The defendants note that the plaintiff is unable to cite any case in which a breach of a union's duty of fair representation served as a basis for liability for personal injury of a union member allegedly caused by unsafe working conditions. They also argue that cases holding that the negligence of a union cannot be the basis of liability for such injuries to a member are applicable. It is clear, however, that the plaintiffs' claim does not rest on allegations of negligence, but on the alleged discriminatory and bad faith conduct of the unions. The language of the cases cited in the excerpt from my previous memorandum is broad enough to include the present complaint, and the defendants have not persuaded me that any policy considerations require special treatment of claims involving personal injuries.

The defendants also argue that even if a claim is stated, the depositions and affidavits on file establish that there was no discriminatory or bad faith conduct by the unions.

I conclude that there remain genuine issues of material facts. One such issue is whether the unions' enforcement of safety provisions arbitrarily discriminated between employees based on the identity of the employer for whom he worked. Therefore, summary judgment is inappropriate. Rule 56 of the Federal Rules of Civil Procedure.

The motion of the International for summary judgment stands on different ground. It is clear that the plaintiffs do not claim that any representative of the International actually did anything or was required to do anything with respect to the conditions under which the plaintiff Wentz worked. The International apparently did play some role in determining certain safety provisions of the collective bargaining agreement, but this has no connection with the discriminatory or bad faith conduct which allegedly caused the plaintiff Wentz' injuries. The plaintiffs' theory is that the International exercises such control over the Local that the acts of the Local are attributable to the International. While the power of the International over the affairs of the Local is considerable, it is no more pervasive than typically has been involved in cases in which it has been held that locals and national or international unions are separate en-

tities. See *United Mine Workers v Coronado Coal Co.*, 259 U.S. 344 (1922); *Gray v International Assoc. of Heat Insulators, Local 51*, 416 F.2d 313 (C.A. 6th Cir. 1969); *DiGiorgio Fruit Corp. v NLRB*, 191 F.2d 642 (C.A. D.C. Cir. 1951). The International's showing in support of its motion, which includes the International's constitution and the applicable collective bargain agreement, establishes that the Local is a separate, albeit dependent, entity, and not an agent of the International. The plaintiff has been unable to offer any showing which creates a factual controversy on this issue; consequently, summary judgment is proper. See *Percival v General Motors Corp.*, 539 F.2d 1126 (C.A. 8th Cir. 1976).

Entry of an order or judgment will be withheld pending statements from counsel regarding utilization of 28 U.S.C. § 1292(b) and Rule 54(b).

Dated October 19, 1977.

BY THE COURT

WARREN K. URBOM
Chief Judge

In The

United States District Court

for the District of Nebraska

CHARLES WENTZ and V.I.P. ELECTRIC, INC., a corporation, PLAINTIFFS,

vs.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL NO. 1525,
DEFENDANTS.

ORDER

CV76-L-60

In accordance with my memorandum of October 19, 1977, filing 49, and following communication with counsel regarding the benefits of immediate appeals,

IT HEREBY IS ORDERED AND ADJUDGED:

1. That the defendants' motion to dismiss, filing 39, is denied; that in accordance with 28 U.S.C. § 1292(b) I hereby state that I am of the opinion that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of the litigation; and

2. That the defendant International Brotherhood of Electrical Workers' motion to dismiss, filing 7, which has been treated as a motion for summary judgment, is granted; that pursuant to Rule 54(b) of the Federal Rules of Civil Procedure I hereby determine that there is no just reason for delay and accordingly

I direct that final judgment in favor of the defendant International Brotherhood of Electric Workers and against the plaintiffs is hereby entered.

Dated December 7, 1977.

BY THE COURT

WARREN K. URBOM
Chief Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of October, 1978, three copies of the Supplemental Appendix to Petition for Writ of Certiorari were mailed, postage prepaid, to David D. Weinberg, Weinberg & Weinberg, P.C., 300 Keeline Building, Omaha, Nebraska, 68102, Counsel for the Respondent. I further certify that all parties required to be served have been served.

Kenneth Cobb

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